

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RUTH ANN CHEESMAN,

Plaintiff,

vs.

AMERITITLE,

Defendant.

NO. CV-07-3094-LRS

ORDER GRANTING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

BEFORE THE COURT is Defendant Amerititle's Motion For Summary Judgment (Ct. Rec. 32), filed on May 25, 2010, and noted without oral argument for June 30, 2010. Plaintiff is proceeding pro se.

Plaintiff has filed a Title VII Civil Rights Act claim against Defendant AmeriTitle relating to plaintiff's alleged discriminatory treatment at AmeriTitle during her nine and one-half weeks as a title assistant. In addition to her claims of race, ethnicity, national origin or sex discrimination, plaintiff alleges retaliation or harassment, and state common law claims for invasion of privacy, defamation, intentional infliction of emotional distress and wrongful termination in violation of public policy.

I. SUMMARY OF FACTS

The following facts are undisputed, except where otherwise indicated. AmeriTitle is a private corporation that provides title,

1 escrow and marketing services in 31 counties with 43 offices in
2 Oregon, Washington and Idaho. AmeriTitle is part of the Jeld-Wen,
3 Inc. family of companies, which includes door, window, millwork
4 manufacturing, assembly, and distribution facilities as well as
5 service entities such as AmeriTitle.

6 Plaintiff Ruth Ann Cheesman's race and ethnicity are Filipino and
7 Asian, and her national origin is the Philippines. Ms. Cheesman
8 submitted an application for employment for a position with
9 AmeriTitle, dated July 16, 2006. Ms. Cheesman had two separate
10 in-person interviews: one with Rick Osborne, General Manager, and one
11 with Marlene Wyatt, Title Manager. During Ms. Cheesman's interview
12 with Mr. Osborne, he did not ask her about her race, but when Mr.
13 Osborne asked Ms. Cheesman to tell him about herself, she voluntarily
14 told him that she is a Filipino. AmeriTitle hired Ms. Cheesman as a
15 title assistant on July 31, 2006. Mr. Osborne notified Ms. Cheesman
16 of AmeriTitle's decision to hire her. When Ms. Cheesman was hired,
17 Mr. Osborne and Ms. Wyatt knew she was Filipino and Asian. Mr.
18 Osborne and Ms. Wyatt knew Ms. Cheesman was Asian when they hired her
19 because of the information she provided during the interview and the
20 color of her hair and skin.

21 Mr. Osborne was Ms. Cheesman's supervisor. Mr. Osborne requested
22 that Ms. Cheesman read AmeriTitle's employee handbook and asked her to
23 sign it after she read it. As stated in the Company's written
24 policies, Ms. Cheesman was an at-will employee who could quit for any
25 reason at any time and who could be terminated for any lawful reason
26 at any time. During her employment, Ms. Cheesman signed and was
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1 familiar with AmeriTitle's harassment policy and knew there was a
2 phone number to call if she felt she was being harassed.

3 Ms. Cheesman's initial job duties included basic order entry,
4 typing of title policies into a Windows-based software application,
5 and customer service. Kathleen Osborne and Jackie Hovey, both senior
6 title employees, trained Ms. Cheesman for the title assistant
7 position, including training Ms. Cheesman on how to enter orders into
8 the computer. Shortly after Ms. Cheesman began her employment, Ms.
9 Wyatt noted that Ms. Cheesman was not meeting the office's minimum
10 production goals because she was generating zero to two reports per
11 day compared with the office's minimum department production goals of
12 ten per day. Defendant states that Ms. Cheesman was making basic
13 typographical errors on her order entry data creating potential
14 problems with issuing timely and correct client information.

15 On August 21, 2006, Mr. Osborne and Ms. Wyatt conducted an
16 internal audit and discovered that Ms. Cheesman was unable to perform
17 the simplest computer functions. Ms. Wyatt had Ms. Hovey observe Ms.
18 Cheesman's data entry process, who reported to AmeriTitle management
19 that Ms. Cheesman lacked the basic understanding to highlight, copy
20 and paste text and she struggled with her typing speed and made
21 frequent typographical errors, despite Ms. Cheesman's assertions on
22 her resume and employment application regarding her computer skills
23 and typing speed of 45-60 words per minute.

24 Later on August 21, Ms. Wyatt met with Ms. Cheesman and co-worker
25 Kathleen Burrough, who was also a title assistant, and warned both of
26 them that they needed to increase their production on typing title
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1 reports. During the meeting, Ms. Wyatt relieved both Ms. Cheesman and
2 Ms. Burrough of nonessential job functions to allow them to
3 concentrate solely on data entry. In addition, Ms. Wyatt suggested
4 that Ms. Cheesman and Ms. Burrough stay at work from 5 to 6 p.m. each
5 evening so that they could get some extra assistance typing title
6 reports until they felt comfortable working on their own. Ms. Cheesman
7 and Ms. Burrough agreed to overtime training. The meeting ended with
8 Ms. Wyatt reminding Ms. Cheesman to meet with outgoing employee Scott
9 King for brief training on copying documents.

10 Toward the end of August, Ms. Wyatt gave Ms. Cheesman some typing
11 training. Ms. Wyatt was on vacation and out of the office from
12 September 1 through September 15, 2006. On September 6, Mr. Osborne
13 asked Ms. Cheesman if she needed or wanted more one-on-one training.
14 Ms. Cheesman assured Mr. Osborne she now felt comfortable working
15 independently and had no need to train further with Ms. Burrough.
16 (Osborne Decl. ¶ 6.) According to Ms. Cheesman she understood all of
17 her job functions and she never went to Ms. Burrough with questions
18 about how to do her job. On September 14 at 9:30 a.m., Ms. Burrough
19 met with Mr. Osborne and expressed concern with Ms. Cheesman's
20 apparent inability to do her job. Ms. Burrough had spent extensive
21 time training Ms. Cheesman, but she reported to Mr. Osborne that Ms.
22 Cheesman continued to interrupt Ms. Burrough with questions
23 frequently. Ms. Burrough said that Ms. Cheesman's frequent requests
24 for assistance were causing Ms. Burrough to fall behind as well.

25 On September 14 at 10:30 a.m., Mr. Osborne met with Ms. Cheesman
26 and again warned her that producing one to two reports per day was
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1 unacceptable. When Mr. Osborne asked Ms. Cheesman about her copier
2 training with Mr. King, Ms. Cheesman said she had not trained with Mr.
3 King. Mr. Osborne reminded Ms. Cheesman that Mr. King had only three
4 days left as a full-time employee with AmeriTitle and that the two
5 must meet before his departure. Mr. Osborne told Ms. Cheesman that
6 she would need to be performing all of her basic job responsibilities
7 up to AmeriTitle's expectations by September 20. On September 18, Mr.
8 Osborne met with Ms. Wyatt and explained that Ms. Burrough had made
9 some progress but that Ms. Cheesman still was not able to do the job.
10 Mr. Osborne asked Ms. Wyatt to watch Ms. Cheesman to see if she felt
11 Ms. Cheesman had made any progress since her last meeting with Ms.
12 Cheesman.

13 On September 21, Mr. Osborne and Ms. Wyatt made the decision to
14 terminate Ms. Cheesman's employment. On September 21, Mr. Osborne and
15 Ms. Wyatt met with Ms. Cheesman and explained that despite
16 AmeriTitle's training efforts, she was performing at an unacceptable
17 level. Mr. Osborne told Ms. Cheesman that she was going to be fired
18 and she could leave that day or she could work for two more weeks.
19 Mr. Osborne told Ms. Cheesman that it was because she was not
20 productive, not the person they were looking for, and that she doesn't
21 know simple computer functions, such as highlighting and cutting and
22 pasting. After Ms. Cheesman said that she could perform the job and
23 showed them that she had performed all of the tasks that she had been
24 given, they told her they would give her two weeks to prove herself
25 and knock their socks off, and then the job would be hers.

26 On September 22, after Ms. Cheesman had been told that AmeriTitle
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1 would terminate her employment, Ms. Cheesman complained to
2 AmeriTitle's corporate legal office and spoke with Jennifer Palmer, an
3 Employee Relations Manager. Ms. Cheesman expressed concern to Ms.
4 Palmer about questions that an AmeriTitle employee, Schiree Sullivan,
5 had asked Ms. Cheesman about her race and children. According to Ms.
6 Cheesman, she was harassed when Ms. Sullivan, who did not manage or
7 supervise Ms. Cheesman, visited the title department and asked Ms.
8 Cheesman about her national origin; Ms. Cheesman told Ms. Sullivan she
9 was Filipino. Ms. Cheesman does not remember how many times she and
10 Ms. Sullivan spoke about Ms. Cheesman's race or national origin except
11 for once when Ms. Sullivan paged Ms. Cheesman via the intercom to go
12 to the next building and asked Ms. Cheesman specific questions.

13 According to Ms. Cheesman, after she told Ms. Sullivan (who
14 worked in the escrow department) that she is Filipino, Ms. Sullivan
15 "made fun" of her with two other female AmeriTitle employees, Sally
16 Wright and Amanda Snyder. Ms. Cheesman says Ms. Sullivan made some
17 remark about "Fili fishing" to Ms. Cheesman, and the employees were
18 laughing. Ms. Sullivan also asked Ms. Cheesman what she considers her
19 children's race/national origin to be. Ms. Cheesman says she told Ms.
20 Sullivan that her kids are Filipino and American. Ms. Cheesman says
21 she does not remember specifics of the rest of the conversation or the
22 date that it occurred, but remembers Ms. Sullivan asked a lot of
23 questions of her race and the race of her kids. The conversation with
24 ended when a customer arrived. This incident is the only specific
25 discussion Ms. Cheesman remembers having with Ms. Sullivan and Ms.
26 Cheesman did not talk to Ms. Sullivan again after this incident.

1 Ms Cheesman reported this incident to Ms. Palmer. Immediately
2 afterwards, Ms. Palmer contacted Mr. Osborne and asked that he conduct
3 an investigation into Ms. Cheesman's concerns. Mr. Osborne then
4 conducted an investigation into Ms. Cheesman's concerns. As part of
5 this investigation, on September 27 at 10:15 a.m., Mr. Osborne and Ms.
6 Wyatt met with Ms. Cheesman. Ms. Cheesman described the alleged
7 comments by Ms. Sullivan. Mr. Osborne told Ms. Cheesman to let him
8 know if she had any further problems. On September 27 at 10:45 a.m.,
9 Mr. Osborne met with Amanda Snyder, an alleged witness to the
10 conversation between Ms. Cheesman and Ms. Sullivan. Ms. Snyder
11 reported to Mr. Osborne that, during the discussion, she never felt
12 that Ms. Cheesman was feeling uncomfortable and that Ms. Cheesman had
13 kept the conversation going with more and more information.

14 On September 27 at 11:05 a.m., Mr. Osborne met with Sally Wright,
15 an alleged witness to the conversation between Ms. Cheesman and Ms.
16 Sullivan. Ms. Wright said she never felt that Ms. Cheesman was
17 offended or that she ever tried to end the conversation. On September
18 27 at 2:20 p.m., Mr. Osborne met with Ms. Sullivan. Ms. Sullivan said
19 she did not mean to offend Ms. Cheesman and that Ms. Cheesman never
20 seemed uncomfortable or hurt in any way. Ms. Sullivan reported that
21 Ms. Cheesman kept the conversation going by adding more information
22 that raised more questions. Ms. Sullivan never thought she was
23 offending Ms. Cheesman and that she certainly never intended to do so.

24 Following the investigation, Mr. Osborne and Ms. Palmer concluded
25 that Ms. Sullivan did not engage in any discriminatory conduct or that
26 she intended to cause Ms. Cheesman any harm. Instead, they concluded
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1 that Ms. Sullivan was curious about Ms. Cheesman's background, but
2 that she articulated that curiosity in an immature and awkward manner
3 that was not consistent with the spirit of the Company's
4 anti-harassment policy. Mr. Osborne counseled Ms. Sullivan and
5 advised her and Ms. Cheesman that conversations of this nature, no
6 matter how innocuously intended, were inappropriate topics in the
7 workplace.

8 Mr. Osborne met with Ms. Cheesman a second time, discussed the
9 information he had found as described above, and encouraged her to
10 come forward if she had any additional concerns. Ms. Cheesman did not
11 approach Mr. Osborne to raise any further issues. Following Mr.
12 Osborne's investigation, on October 2, Ms. Palmer called Ms. Cheesman
13 to give her the results of the investigation. Ms. Cheesman prevented
14 Ms. Palmer from doing so and abruptly ended the conversation by
15 stating that she wished no further communication with Ms. Palmer or
16 the Company. In Mr. Osborne's view, Ms. Cheesman's performance did
17 not improve after September 21 and she continued to be unable to meet
18 the minimum daily report goals.

19 On October 4, 2006, AmeriTitle terminated Ms. Cheesman's
20 employment, because her performance did not improve and she continued
21 to be unable to meet the minimum daily report goals. Plaintiff, on
22 the other hand, relates that her performance was not deficient. Ms.
23 Cheesman believed she had performed adequately throughout her
24 employment so she is unable to identify any changes she made in her
25 performance at the point that she was told she would be fired and she
26 requested one final chance.

1 Ms. Cheesman asserts that when she worked at AmeriTitle she
2 experienced discrimination and retaliation because of her race,
3 ethnicity and national origin. Except for Ms. Sullivan, who did not
4 manage or supervise Ms. Cheesman, no other AmeriTitle employee ever
5 made a comment to Ms. Cheesman about her race, ethnicity or national
6 origin. Ms. Cheesman says that Ms. Burrough treated her nicely at
7 work and Ms. Cheesman has no reason to believe Ms. Burrough had any
8 kind of racial bias or negative feelings towards her. Ms. Burrough
9 reported repeatedly to AmeriTitle management that Ms. Cheesman's work
10 was inadequate and Mr. Cheesman's questions distracting.

11 Ms. Cheesman also testified that she believed that Ms. Burrough
12 and an employee named Molly Kelly were treated more favorably than
13 her. Ms. Kelly was an escrow assistant who worked in a different
14 department than Ms. Cheesman. Ms. Cheesman does not know of any other
15 title assistant who had the same record as she did in terms of report
16 production. According to Ms. Cheesman, Mr. Osborne was motivated by
17 her race in terminating her employment because she believes his
18 negative perception of her work performance that she made mistakes,
19 was not a productive person, and did not know simple computer skills
20 were not true. Mr. Osborne never made a comment about her race,
21 ethnicity or national origin. Ms. Cheesman further contends that she
22 was replaced by a white employee, but cannot identify who that
23 allegedly was. She says that AmeriTitle's questioning of her ability
24 shows that its management was racist. AmeriTitle did not replace Ms.
25 Cheesman with anyone.

26 Ms. Cheesman's sexual harassment complaint is based on her
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1 allegedly witnessing of Mr. Osborne touching the bottom of his wife
2 (and AmeriTitle employee) Ms. Osborne. Ms. Cheesman says he was
3 looking in her direction when he touched his wife. Ms. Cheesman knew
4 that Mr. and Ms. Osborne were a married couple. Ms. Cheesman never
5 complained to any AmeriTitle manager about the issue, despite her
6 knowledge of AmeriTitle's harassment and discrimination policy. Mr.
7 Osborne never touched Ms. Cheesman and never made any verbal or
8 written sexual remarks to Ms. Cheesman. Ms. Cheesman does not have
9 any recollection of telling Ms. Palmer about any sexual harassment.

10 With respect to Ms. Cheesman's invasion of privacy claim, Ms.
11 Cheesman says that during her job interview, Mr. Osborne asked her if
12 she had children, what her husband does for a living, and where her
13 husband worked. Ms. Cheesman says she told Ms. Osborne that her
14 husband worked as a janitor at a hospital. Ms. Cheesman was not
15 embarrassed about it, and Mr. Osborne subsequently offered her a job.

16 With regard to Ms. Cheesman's defamation claim, she asserts that
17 she was defamed when her ability was questioned. Ms. Cheesman does
18 not have any information from anyone outside AmeriTitle to suggest
19 that Ms. Wyatt or Mr. Osborne has said anything negative or untruthful
20 about her and Ms. Cheesman does not know if any statement by Mr.
21 Osborne caused her to not get a job.

22 **II. BURDEN OF PROOF**

23 The summary judgment motion before the Court are subject to the
24 standard of Federal Rule of Civil Procedure 56, that there be no
25 genuine issue of material fact. The motion is also subject to the
26 shifting burdens of proof of *Celotex Corporation v. Catrett*, 477 U.S.
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1 317, 106 S.Ct. 2549 (1986). To succeed on summary judgment, plaintiff
2 must prove each element essential to the claims upon which he seeks
3 judgment by undisputed facts. *Fontenot v. Upjohn Co.*, 780 F.2d 1190,
4 1194 (5th Cir.1986).

5 In contrast, a defendant faces a lighter burden. Because the
6 defendant does not bear the burden of proof at trial, defendant needs
7 only point to the insufficiency of plaintiff's evidence to shift the
8 burden to plaintiff to raise genuine issues of fact as to each claim
9 by substantial evidence. *T.W. Electric Service, Inc. v. Pacific Elec.*
10 *Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987) (citing *Celotex*,
11 106 S.Ct. at 2553; *Kaiser Cement Corp. v. Fischbach & Moore, Inc.*, 793
12 F.2d 1100, 1103-04 (9th Cir.), *cert. denied*, 107 S.Ct. 435 (1986)). If
13 plaintiff fails to raise a genuine issue of fact, then summary
14 adjudication in favor of defendant will be granted.

15 When judging the evidence at the summary judgment stage, the
16 Court does not make credibility determinations or weigh conflicting
17 evidence, and is required to draw all inferences in a light most
18 favorable to the nonmoving party. *T.W. Electric*, 809 F.2d at 630-31
19 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S.Ct.
20 1348, 1356 (1986)); *Ting v. United States*, 927 F.2d 1504, 1509 (9th
21 Cir.1991).

22 The standard for judging a motion for summary judgment is the
23 same standard used to judge a motion for a directed verdict: "whether
24 the evidence presents a sufficient disagreement to require submission
25 to a jury or whether it is so one-sided that one party must prevail as
26 a matter of law." *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505,
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1 2512 (1986).

2 In meeting their burdens of proof, each party must come forward
3 with admissible evidence. Fed.R.Civ.P. 56(e). Conclusory,
4 speculative testimony in affidavits and moving papers is insufficient
5 to raise genuine issues of fact and defeat summary judgment. See
6 *Thornhill Publishing Co. v. GTE Corp.*, 594 F.2d 730, 738 (9th
7 Cir.1979). Plaintiff must ultimately persuade the Court in opposing
8 summary judgment that she will have sufficient admissible evidence to
9 justify going to trial.

10 A "party opposing a motion for summary judgment must file with
11 its responsive memorandum a statement in the form prescribed in [LR
12 56.1](a), setting forth the specific facts which the opposing party
13 asserts establishes a genuine issue of material fact precluding
14 summary judgment." LR 56.1(b). Pursuant to paragraph (a) of LR 56.1, a
15 "party filing a motion for summary judgment shall set forth separately
16 from the memorandum of law, and in full, the specific facts relied
17 upon in support of the motion." LR 56.1(a). "The specific facts shall
18 be set forth in serial fashion and not in narrative form." *Id.* As to
19 each fact, the statement shall refer to the specific portion of the
20 record where the fact is found" *Id.* "In determining any motion
21 for summary judgment, the Court may assume that the facts as claimed
22 by the moving party are admitted to exist without controversy except
23 as and to the extent that such facts are controverted by the record
24 set forth in [LR 56.1](b)." LR 56.1(d).

25 In the instant motion, contrary to LR 56.1(b), plaintiff did not
26 file a separate statement setting forth the specific facts which she
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1 asserts establish a genuine issue of material fact precluding summary
2 judgment. Further, to the extent plaintiff asserts in her opposition
3 memorandum that there are issues of material fact sufficient to
4 preclude summary judgment, she failed to comply with LR 56.1(a)
5 because she did not refer to the specific portions of the record where
6 the facts are located. For instance, plaintiff simply states "there
7 is a disputed fact . . ." in her opposition response but fails to cite
8 any evidence to support her assertions. (Ct. Rec. 39 at 4-7.) In
9 paragraph 1 of section III, plaintiff asserts that "the Defendant
10 fabricated evidences against Plaintiff," but fails to cite any
11 evidence that supports her claim. (*Id.* at 4.) Without any
12 evidentiary support, she makes the same claims about fabricated
13 evidence in paragraphs 2, 4, and 6 of section III. *Id.* Finally, none
14 of the other "facts" plaintiff asserts in section III refer to the
15 specific portions of the record where the facts are found. Plaintiff's
16 mere assertions, without evidentiary support, do not create genuine
17 issues of material fact sufficient to preclude summary judgment. Under
18 LR 56.1(d), the court may assume that the facts stated in defendant's
19 Statement of Material Facts are not opposed and hence admitted.

20 Further, plaintiff's opposition memorandum does not address
21 defendant's arguments that plaintiff failed to produce evidence
22 sufficient to raise genuine issues of material fact on plaintiff's
23 claims under the Fifth and Fourteenth Amendments to the U.S.
24 Constitution, for invasion of privacy, and for intentional infliction
25 of emotional distress. Defendant requests this Court to dismiss the
26 constitutional claims based on plaintiff's failure to oppose
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1 defendant's arguments with regard to those specific claims.

2 **III. DISCUSSION**

3 **A. FEDERAL CLAIMS**

4 **1. Title VII Discrimination Claim**

5 To establish a prima facie case of discrimination, a plaintiff
6 must produce evidence showing that "(1) [s]he belongs to a protected
7 class; (2) [s]he was performing her position in a satisfactory manner;
8 (3) [s]he was subjected to an adverse employment action; and (4)
9 similarly situated [persons outside her protected class] were treated
10 more favorably." *Aragon v. Republic Silver Slate Disposal, Inc.*, 292
11 F.3d 654, 658 (9th Cir. 2002) (citation omitted).

12 Plaintiff, Ms. Cheesman, asserts that defendant employer,
13 AmeriTitle, terminated plaintiff's at-will employment because of
14 plaintiff's race. Plaintiff also asserts that a co-worker, Ms.
15 Sullivan, discriminated against plaintiff by inquiring about Ms.
16 Cheesman's race/national origin and the race of her children.

17 AmeriTitle does not dispute that plaintiff satisfies the first
18 and third elements to establish a prima facie case. She is a member of
19 a protected class and she was discharged. Ms. Cheesman, however,
20 cannot produce any evidence to show that she was performing her
21 position in a satisfactory manner or that similarly-situated persons
22 outside her protected class were treated more favorably.

23 Defendant argues that other than her bare assertions to the
24 contrary, plaintiff has not produced any evidence that she was
25 performing her position in a satisfactory manner. AmeriTitle has
26 produced uncontradicted evidence that Ms. Cheesman failed throughout
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1 her employment to meet the minimum production goal of ten reports per
2 day, and this is supported by her own notes. (Pl. Exs. 9, 10, 11, 12,
3 14; Osborne Decl. ¶¶ 3, 14.) Defendant concludes that Ms. Cheesman has
4 not established a prima facie case that she performed her position in
5 a satisfactory manner. See *Pejic v. Hughes Helicopters, Inc.*, 840 F.2d
6 667, 672 (9th Cir. 1988).

7 As to Ms. Cheesman's allegation that other employees were treated
8 more favorably, she must show that employees allegedly receiving more
9 favorable treatment are similarly situated. Plaintiff "must
10 demonstrate, at the least, that [she is] similarly situated to those
11 employees in all material respects." *Moran v. Selig*, 447 F.3d 748, 755
12 (9th Cir. 2006). The only evidence offered by plaintiff to show that
13 AmeriTitle treated a similarly situated employee more favorably is
14 plaintiff's speculation that Ms. Burrough and an employee named Molly
15 Kelly were treated more favorably. Ms. Kelly is not similarly
16 situated to plaintiff because she worked in a different department as
17 a title assistant and has different duties than an escrow assistant.
18 Further, Ms. Cheesman has not produced any evidence of any other title
19 assistant who produced only 1-2 reports per day instead of the
20 required 10 reports.

21 Defendant asserts that Ms. Cheesman cannot establish a prima
22 facie case of discrimination. AmeriTitle asserts that it terminated
23 Ms. Cheesman's employment because her performance did not improve and
24 she continued to be unable to meet the minimum daily report goal. In
25 response to her discharge, Ms. Cheesman testified that she believes
26 Mr. Osborne was motivated by racial animus because she disagreed with
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1 his assessment of her work performance that she made mistakes, was not
2 productive, and did not have basic computer skills. Ms. Cheesman
3 claims that AmeriTitle's questioning of her ability shows that her
4 employers were racist but when the same actor is responsible for both
5 the hiring and firing of a discrimination plaintiff, it creates a
6 "strong inference" that the employer is not biased against the
7 protected class to which the employee belongs. *Coghlan v. American*
8 *Seafoods Co. LLC*, 413 F.3d 1090, 1096-98 (9th Cir. 2005). Both Mr.
9 Osborne and Ms. Wyatt made the decision to hire plaintiff and then,
10 less than two months later, both agreed on the decision to terminate
11 her employment due to underperformance. Ms. Cheesman also claims that
12 she believes she was replaced by a white employee, but she cannot
13 identify the employee.

14 To the contrary, it is undisputed that AmeriTitle did not replace
15 Ms. Cheesman with anyone. The Court finds defendant's argument that
16 Ms. Cheesman failed to establish a prima facie case of discrimination
17 is convincing. Ms. Cheesman's mere speculation of AmeriTitle's
18 motivation and her subjective personal judgment of her performance
19 fall far short of the "specific and substantial" evidence required to
20 overcome an employer's motion for summary judgment. See *Forsberg v.*
21 *Pacific Northwest Bell Tel. Co.*, 840 F.2d 1409, 1413 (9th Cir. 1988)
22 ("purely conclusory allegations of alleged discrimination, with no
23 concrete, relevant particulars, will not bar summary judgment");
24 *Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 270 (9th Cir. 1996)
25 (concluding, despite the plaintiff's "claims she had been performing
26 her job adequately and had received no feedback indicating otherwise,"
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1 that "an employee's subjective personal judgments of her competence
2 alone do not raise a genuine issue of material fact"). The Court
3 finds that AmeriTitle's legitimate, nondiscriminatory reason for
4 terminating plaintiff's employment is born out of the undisputed
5 facts. The Title VII claim is summarily dismissed and judgment
6 granted in favor of AmeriTitle.

7 **2. 42 U.S.C. § 1981 Claim**

8 Plaintiff alleges race discrimination under 42 U.S.C. § 1981.
9 Both Title VII and § 1981 require proof of intentional discrimination
10 and the same standards apply to both claims. *Lowe v. Monrovia*, 775
11 F.2d 998, 1010 (9th Cir. 1985), *amended by*, 784 F.2d 1407 (1986).
12 Defendant asserts that to establish a prima facie case of Title VII
13 retaliation, a plaintiff must produce evidence that: (1) she engaged
14 in a protected activity, (2) she suffered an adverse employment
15 action, and (3) there was a causal link between the protected activity
16 and the adverse employment action. *Davis v. Team Elec. Co.*, 520 F.3d
17 1080, 1094 (9th Cir. 2008). An employment action is adverse if it
18 "might have dissuaded a reasonable worker from making or supporting a
19 charge of discrimination." *Burlington Northern and Santa Fe Ry. Co. v.*
20 *White*, 548 U.S. 53, 68 (2006) (internal quotations omitted).

21 For the purpose of summary judgment, AmeriTitle concedes that
22 plaintiff engaged in protected activity on September 22, 2009, when
23 she raised concerns with Ms. Palmer about her conversation with Ms.
24 Sullivan, one day after Mr. Osborne and Ms. Wyatt told Ms. Cheesman
25 that her employment would be terminated. AmeriTitle also concedes the
26 termination of plaintiff's employment was an adverse employment
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1 action. Defendant argues that plaintiff, however, cannot produce any
2 evidence of a causal link between her protected activity and
3 termination or that AmeriTitle's reasons for her termination are a
4 pretext for discrimination.

5 Defendant argues that courts have repeatedly made clear that the
6 prohibition against retaliation does not immunize nonproductive or
7 inappropriate conduct at work. *Clark County School Dist. v. Breeden*,
8 532 U.S. 268, 272 (2001) ("Employers need not suspend previously
9 planned transfers upon discovering that a Title VII suit has been
10 filed, and their proceeding along lines previously contemplated,
11 though not yet definitively determined, is no evidence whatsoever of
12 causality."). Although Mr. Osborne and Ms. Wyatt gave Ms. Cheesman the
13 chance to "knock [their] socks off," Ms. Cheesman does not identify
14 any aspect of her performance that she changed and, thus, her
15 employment was terminated as planned. Plaintiff has not produced any
16 evidence¹ of pretext and for the foregoing reasons, plaintiff's
17 retaliation claim is dismissed and summary judgment granted in favor
18 of defendant.

19 **3. Fifth and Fourteenth Amendment Rights**

20 Plaintiff alleges in her complaint that AmeriTitle violated her
21 Fifth and Fourteenth Amendment rights in that she was deprived of her
22 "rights and privileges as secured by the Constitution and laws of the
23 United States as a result of an intentional discrimination act of the
24 defendant and its employees." (Complaint, ¶ 13(a).) Plaintiff also
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26 ¹Plaintiff has not supplied any supporting affidavit, deposition,
27 report or other documentation to support any of her assertions and
conclusory statements.

1 alleges that she was "able and available, and qualified for the job or
2 position held that is full, consistent and complete they provide to
3 white persons." (Complaint, ¶ 13b.)

4 Defendant argues that the Fifth Amendment claim fails because the
5 Fifth Amendment to the U.S. Constitution only "prohibits the federal
6 government from depriving persons of due process." *Castillo v.*
7 *McFadden*, 399 F.3d 993, 1002 n.5 (9th Cir. 2005); *Bingue v. Prunchak*,
8 512 F.3d 1169, 1174 (9th Cir. 2008). The Court finds that this claim
9 fails because the Fifth Amendment's due process clause only applies to
10 the federal government.

11 Defendant argues that plaintiff's Fourteenth Amendment claim
12 fails because the Amendment protects against state government
13 infringements on the privileges and immunities of citizens, and
14 requires due process and equal protection. A claim under this
15 Amendment requires "state action." *Gorenc v. Salt River Project*
16 *Agricultural Improv. & Power Dist.*, 869 F.2d 503, 506 (9th Cir. 1989),
17 *cert. denied*, 493 U.S. 899 (1989). The Court finds that this claim
18 fails because plaintiff has not made any allegations and has not
19 produced any evidence that any state government was involved in any of
20 AmeriTitle's alleged conduct. The Court finds summary judgment in
21 favor of defendant and plaintiff's Fifth and Fourteenth Amendment
22 claims are hereby dismissed.

23 **4. Title VII-Hostile Work Environment Claim**

24 Ms. Cheesman asserts that she witnessed Mr. Osborne touch the
25 bottom of another AmeriTitle employee, who was married to Mr. Osborne,
26 when Mr. Osborne was looking at Ms. Cheesman. Plaintiff also suggests
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1 that she was subjected to a hostile work environment because of her
2 race, ethnicity and national origin.

3 Defendant argues that this conduct falls short of conduct that a
4 reasonable person would find hostile or abusive and there is no
5 evidence that it interfered with the conditions of Ms. Cheesman's
6 employment. Defendant further states that Ms. Cheesman knew that Mr.
7 and Ms. Osborne were a married couple; she never objected; and did not
8 call the corporate office to protest, despite reading and signing the
9 corporate harassment policy and procedures in the employee handbook.
10 Furthermore, defendant notes, Mr. Osborne never touched Ms. Cheesman
11 and never made any verbal or written sexual remarks to Ms. Cheesman.

12 Defendant denies that it created a hostile work environment based
13 on race or ethnicity. Defendant argues that the only conduct to which
14 plaintiff complained was the conversation Ms. Cheesman had with Ms.
15 Sullivan regarding her race and the race of her children. Similar to
16 plaintiff's sexual harassment claim, such conduct is not severe or
17 pervasive to a reasonable person, and not sufficient to survive
18 summary judgment.

19 The Court agrees with defendant that Ms. Cheesman has not
20 produced any evidence supporting her hostile work environment claim.
21 "Conduct which unreasonably interferes with work performance can alter
22 a condition of employment and create an abusive working environment."
23 *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991). The "objective
24 severity of harassment should be judged from the perspective of a
25 reasonable person in the plaintiff's position, considering 'all the
26 circumstances.'" *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S.

1 75, 81 (1998). The Court finds that a reasonable person in
2 plaintiff's position would not be offended as plaintiff purports to
3 have been.

4 Plaintiff asserts that AmeriTitle's "hostility continue harassing
5 Plaintiff by keep on talking without action but termination and
6 retaliation against Plaintiff." Plaintiff provides no evidence to
7 support her assertions of a hostile work environment. For the
8 foregoing reasons, the court finds in favor of defendant and
9 plaintiff's Title VII hostile work environment claim is dismissed.
10 Therefore, the Court concludes that all of plaintiff's federal claims
11 are dismissed.

12 **B. State Law Claims**

13 **1. Invasion of Privacy Claim**

14 Plaintiff testified that her right to privacy was invaded by Mr.
15 Osborne when he asked if plaintiff had children, what her husband did
16 for a living, and where her husband worked. Plaintiff also contends
17 that Ms. Sullivan invaded her privacy by asking questions about Ms.
18 Cheesman's race and national origin and the race of her children.

19 Defendant explains that Washington has adopted the Restatement
20 (Second) of Torts § 652(D) (1977) general rule for invasion of
21 privacy, which provides:

22 One who gives publicity to a matter concerning the
23 private life of another is subject to liability to
24 the other for invasion of his privacy, if the
25 matter publicized is of a kind that (a) would be
26 highly offensive to a reasonable person, and (b)
is not of legitimate concern to the public.

27 *Reid v. Pierce County*, 136 Wn.2d 195, 205, 961 P.2d 333 (1998)

1 (quoting Restatement (Second) of Torts § 652D (1977)).

2 Defendant argues that there is no evidence that anyone from
3 AmeriTitle communicated any private information about Ms. Cheesman
4 to any third party or the public at large. Rather, Mr. Osborne and Ms.
5 Sullivan merely asked questions and Ms. Cheesman says she provided the
6 information. Asking about Ms. Cheesman's spouse, children, and work
7 history is not highly offensive to a reasonable person because people
8 regularly ask new acquaintances similar questions. The Court finds
9 that the undisputed facts in the record do not support Ms. Cheesman's
10 claim for invasion of privacy. Therefore, the Court finds in favor of
11 defendant and dismisses this claim.

12 **2. Defamation Claim**

13 Ms. Cheesman testified that Mr. Osborne and Ms. Wyatt defamed her
14 by questioning her ability and job performance. Defendant argues that
15 these statements are not statements of fact but rather expressions of
16 opinion about Ms. Cheesman's work ability. Thus, they cannot be proved
17 false and are not actionable.

18 The Court agrees with defendant. Defamation requires that a
19 plaintiff prove falsity, an unprivileged communication, fault, and
20 damages. *Mohr v. Grant*, 153 Wn.2d 812, 822 (2005). The Court finds
21 that the allegedly defamatory statements made by Mr. Osborne and Ms.
22 Wyatt were made as part of their evaluation of Ms. Cheesman's work
23 and, thus, were privileged communications. Further, defamation is
24 concerned with compensating the injured party for damage to
25 reputation. *Eastwood v. Cascade Broad. Co.*, 106 Wn.2d 466, 471, 722
26 P.2d 1295 (1986).

1 Plaintiff has not produced any evidence of any false,
2 non-privileged statements or any damages caused by the allegedly
3 defamatory statements. Plaintiff has not shown that the allegedly
4 defamatory statements were made to anyone outside of AmeriTitle. Ms.
5 Cheesman simply has not produced any evidence raising a genuine issue
6 of material fact regarding this claim. Thus, the Court is unable to
7 find that plaintiff's reputation could have been damaged under the
8 facts of this case. Therefore, the Court finds in favor of defendant
9 and the defamation claim is dismissed.

10 3. Outrage Claim

11 Plaintiff states in her First Amended Complaint that "[t]he
12 Defendants [sic] conduct was outrageous and an abuse of the position
13 of Defendants. Said conduct was intended to cause severe emotional
14 distress, or done in conscious disregard of the probability of causing
15 such distress." (Ct. Rec. 14 at 6.)

16 Defendant argues that the conduct alleged by Ms. Cheesman cannot
17 be characterized as outrageous, extreme, beyond all possible of
18 decency, atrocious or utterly intolerable in a civilized community.
19 Defendant next argues, citing *Haubry v. Snow*,² that plaintiff's claim
20 must be dismissed because an employee may not recover damages for
21 emotional distress in an employment context unless "the factual basis
22 for the claim is distinct from the factual basis for the
23 discrimination claim." 106 Wn.App. at 680. Defendant asserts that the
24

25 ²*Haubry v. Snow*, 106 Wn. App. 666, 680, 31 P.3d 1186 (2001)
26 (holding that the plaintiff's intentional and negligent infliction of
27 emotional distress claims failed because the factual basis for them
were the same as the factual basis for the plaintiff's sexual
harassment and discrimination claims).

1 factual basis for Ms. Cheesman's emotional distress claim is the same
2 as the factual basis which supports her discrimination and retaliation
3 claims and therefore must fail.

4 To prevail on a claim of outrage or intentional infliction of
5 emotional distress, a plaintiff must prove three elements: "(1)
6 extreme and outrageous conduct, (2) intentional or reckless infliction
7 of emotional distress, and (3) severe emotional distress on the part
8 of the plaintiff." *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002
9 (1989). The first element requires proof that the conduct was "so
10 *outrageous in character, and so extreme in degree, as to go beyond all*
11 *possible bounds of decency, and to be regarded as atrocious, and*
12 *utterly intolerable in a civilized community.*" *Id.* (italics in
13 original).

14 The first element of the test goes to the jury only after the
15 court "determine[s] if reasonable minds could differ on whether the
16 conduct was sufficiently extreme to result in liability." *Id.*
17 "[M]ere insults and indignities, such as causing embarrassment or
18 humiliation, will not support imposition of liability on a claim of
19 outrage." *Id.* The Court finds that no reasonable mind could find that
20 the allegedly outrageous conduct was sufficiently extreme to give rise
21 to liability. For the foregoing reasons, the Court finds in favor of
22 defendant and plaintiff's outrage claim is dismissed.

23 **4. Wrongful Termination Claim**

24 Plaintiff claims wrongful termination based on her subjective
25 belief that she was fired in retaliation for her complaints to Mr.
26 Osborne. Defendant asserts that Ms. Cheesman's wrongful termination
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1 claim fails for the same reasons that her Title VII retaliation claim
2 failed. Defendant states it is undisputed that Ms. Cheesman did not
3 complain until after Mr. Osborne and Ms. Wyatt had informed her of
4 their decision to terminate her employment. Although Ms. Cheesman was
5 given the chance she requested to "knock the socks off" of Mr. Osborne
6 and Ms. Wyatt, her performance did not improve and, thus, the
7 discharge was carried out as planned.

8 Under Washington common law, at-will employees can quit or be
9 fired for any reason. *Roberts v. Atlantic Richfield Co.*, 88 Wn.2d 887,
10 891, 568 P.2d 764 (1977). Washington law recognizes that exceptions to
11 the at-will doctrine have been allowed, such as "where employees are
12 fired for exercising a legal right or privilege." *Dicomes*, 113 Wn.2d
13 at 618.

14 The Court finds that there are no exceptions applicable to this
15 case and that plaintiff was terminated legally as a result of her
16 performance deficiencies. Ms. Cheesman has not produced evidence
17 raising any genuine issue of material fact regarding her claim. For
18 the foregoing reasons, the Court finds in favor of the defendant and
19 plaintiff's wrongful termination claim is dismissed.

20 **IV. CONCLUSION**

21 Defendant has proven the insufficiency of the plaintiff's
22 evidence. Plaintiff has failed to raise any genuine issues of
23 material fact and has failed to prove the elements essential to claims
24 upon which she seeks summary judgment. Accordingly,

25 **IT IS ORDERED** that:

26 1. Defendant's Motion For Summary Judgment, **Ct. Rec. 32**, filed
27

1 May 25 2010, is **GRANTED**. Plaintiff's claims are dismissed in their
2 entirety and with prejudice.

3 2. Defendant's Motion for Extension of Time to File, **Ct. Rec.**
4 **41**, filed July 19, 2010, is **DENIED as MOOT**.

5 **IT IS SO ORDERED.** The District Court Executive is directed to
6 enter this Order, forward a copy to plaintiff, enter judgment
7 consistent with this order, and **CLOSE FILE**.

8 DATED this 22nd day of July, 2010.

9 ***s/Lonny R. Suko***

10 _____
11 LONNY R. SUKO
12 CHIEF UNITED STATES DISTRICT JUDGE
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